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20 **UNITED STATES BANKRUPTCY COURT**
DISTRICT OF NEVADA

21 In re:

22 USA COMMERCIAL MORTGAGE COMPANY,
 23 Debtor.

24 Case No. BK-S-06-10725-LBR

25 Case No. BK-S-06-10726-LBR

26 Case No. BK-S-06-10727-LBR

27 Case No. BK-S-06-10728-LBR

28 Case No. BK-S-06-10729-LBR

29 USA CAPITAL REALTY ADVISORS, LLC,
 30 Debtor.

31 Chapter 11

32 USA CAPITAL DIVERSIFIED TRUST DEED FUND,
 33 LLC,
 34 Debtor.

35 **REPLY OF ESTATE OF DANIEL**
TABAS AND FERTITTA
ENTERPRISES, INC., TO
DEBTORS' OPPOSITION TO
MOTION FOR RELIEF FROM
THE AUTOMATIC STAY TO
TERMINATE THE LOAN
SERVICING AGREEMENT FOR
THE DIRECT LOAN TO COLT
GATEWAY LLC

36 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 37 Debtor.

38 USA SECURITIES, LLC,
 39 Debtor.

40 Affects:

- 41 All Debtors
- 42 USA Commercial Mortgage Company
- 43 USA Capital Realty Advisors, LLC
- 44 USA Capital Diversified Trust Deed Fund, LLC
- 45 USA Capital First Trust Deed Fund, LLC
- 46 USA Securities, LLC

47 Hearing Date: February 15, 2007

48 Hearing Time: 9:30 am

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The Estate of Daniel Tabas ("Tabas") and Fertitta Enterprises, Inc. ("Fertitta") reply to the opposition filed by Debtors USA Commercial Mortgage Company and USA Capital Diversified Trust Deed Fund, LLC ("Debtors") (Ct. Dkt. #2696-97, Opposition & T. Allison decl., filed Feb. 5, 2007) and joined by the Official Committee of Unsecured Creditors for USA Commercial Mortgage Company (Ct. Dkt. #2706, filed Feb. 7, 2007).¹

MEMORANDUM OF POINTS AND AUTHORITIES

As an initial point, Tabas and Fertitta emphasize that they hold a majority interest in the Colt Gateway loan, in terms of interest and the number of lenders. Debtors argue that Diversified Trust has a "substantial" interest in the loan, but they omit the fact that it has a minority interest in the loan. Tabas and Fertitta, as the majority lenders, are entitled to make changes in the servicing agent under the terms of the Tabas servicing agreement and Nevada state law.

A. Tabas and Fertitta timely filed their motion.

Debtors assert that the motion is not timely because it was filed at a critical time on the eve of the plan effective date. Debtors have no basis for this representation. Whether movants are allowed to change the servicing rights on this loan has no bearing on the plan effective date. Debtors make reference to the closing date with Compass, a condition precedent to the plan effective date. However, Compass is not buying the Colt Gateway loan, and the underlying motion here does not effect Debtors' ability to close the Compass sale.

Even if the plan effective date were relevant to this motion, Debtors have never even determined (or at least disclosed) the plan effective date. Debtors acknowledge that the plan cannot become effective until they close the Compass sale, and they represent that they will close on February 14, 2007, two days from now (Opposition at 3, ¶7). Yet the only evidence on the record indicates debtors cannot close the sale for reasons completely unrelated to the loan in question here. To close, Compass must be licensed as a loan-servicing agent. However, the State of Nevada has indicated that it is not going to license Compass. Ex. 1, D. Cangelosi decl. & supporting email, originally filed as Ct. Dkt #37 in *Lenders Protection Group v. USA Commercial*

1 The Diversified Committee's joinder does not contain any additional arguments, so movants file a single reply.

1 *Mortgage Co.*, Case No. 07-0072 (D. Nev. filed Feb. 9, 2007). If Compass is not licensed, there is
 2 no way to know when the plan will go effective.

3 Debtors also suggest that Tabas and Fertitta delayed in bringing this motion. Movants
 4 wholeheartedly disagree. The Jones Vargas Direct Lenders brought a motion for stay relief at the
 5 start of this case, seeking permission to change servicing agents if a majority of lenders on any of
 6 their loans wanted to change the servicing agent. The Court denied the motion. Another direct
 7 lender, Scott Canepa, assembled a majority of the lenders in another loan and moved for relief to
 8 exercise his contractual and legal rights to change the servicing agent. The Court denied the
 9 motion. As a result of the Court's prior rulings, Tabas and Fertitta decided it would be prudent to
 10 wait until the plan was confirmed, giving debtors ample opportunity to address issues that
 11 undercut a change of servicing agent earlier in the case. Movants were dilatory and should be able
 12 to select a servicing agent of their choice.

13 Now, with uncertainty debtors' plan effective date, Tabas and Fertitta are entitled to
 14 replace USA Commercial as the servicing agent. Tabas and Fertitta cannot accept debtor's
 15 indifference to the default on the Colt Gateway loan. They are entitled by contract and state law
 16 to replace the servicing agent, and request relief from the automatic stay to do so.

17 **B. Cause exists to grant movants' requested relief from the automatic stay.**

18 Debtors' assert there is no evidence or law to support relief from the automatic stay, but
 19 they ignore the contents of the motion. The motion contained a copy of the disciplinary report
 20 from the Nevada Division of Mortgage Lending (Ct. Dkt. #2457, Ex. L), and Debtors admit that
 21 USA Commercial has allowed the loan to remain in default throughout the bankruptcy without
 22 taking any action to foreclose under the Tabas/Diversified loan-servicing agreements and Nevada
 23 state law (Opposition at 3, ¶8). Debtors assert that Mr. Allison has "worked diligently and in good
 24 faith to fulfill USACM's duties," yet neither Debtors nor Mr. Allison provide any evidence of his
 25 efforts. Indeed, Tabas and Fertitta notified Mr. Allison months ago of their desire to foreclose this
 26 loan. The loan remains in default today, despite Mr. Allison's repeated assurances that he would
 27 reach a deal with the borrower. Indeed, Debtors acknowledge that Mr. Allison relied upon the
 28 interest of unrelated parties--people who were not invested in the Colt Gateway loan--in deciding

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1 that it was not in Tabas and Fertitta's best interest to foreclose the loan. *Id.* Debtors combined
 2 pre- and post-petition conduct, along with an admitted lack of adequate security (Opposition at 3,
 3 ¶9), are sufficient cause to terminate the automatic stay. *See In re Colrud*, 45 B.R. 169, 178 n. 12
 4 (Bankr. D. Alaska 1984) (debtor's breaches may constitute cause for stay relief); *accord In re*
 5 *Zeoli*, 249 B.R. 61, 63-64 (Bankr. S.D.N.Y. 2000) (ongoing breaches constitute cause); *In re*
 6 *Palace Quality Servs. Indus., Inc.*, 283 B.R. 868, 906 n.40 (Bankr. E.D. Mich. 2002) (post-petition
 7 lease rejection constitutes cause).

8 That said, Tabas and Fertitta prefer to have the borrower immediately pay off the loan.
 9 Positively, debtors have represented that they can get the loan paid off. On February 7, 2007,
 10 during a teleconference with Fertitta's chief financial officer, William J. Bullard, and counsel for
 11 the parties, Mr. Allison stated he had reached an agreement with the borrower to pay the direct
 12 lenders in full. Chubb decl., filed concurrently with this motion. Mr. Allison agreed to provide
 13 the written terms of the agreement as well as a payoff letter. *Id.* To date, the movants have not
 14 received anything written from Mr. Allison or debtors. *Id.* Debtors inability to provide any
 15 documents is particularly vexing, because the borrower's counsel has represented to the movants
 16 that the borrower is ready and willing to pay off the loan. *Id.*

17 This is a case where the lenders want the loan paid off, and the borrower wants to pay off
 18 the loan. Debtor has had more than ten months to make this deal work, but today--days before the
 19 purported plan effective date--debtors are unable to provide the figures and documents to pay off
 20 this loan. Given the continued uncertainty surrounding this loan, Tabas and Fertitta are compelled
 21 to seek stay relief to hire their own servicing agent.

22 **C. Movants did not omit pertinent facts in their request.**

23 Movants concurrently filed a motion for an ordering shortening time (Ct. Dkt. #2460, filed
 24 Jan. 17, 2007, attached as Ex. 2). The Official Committee of Equity Security Holders of USA
 25 Capital Diversified Trust Deed Fund, LLC, opposed the motion (Ct. Dkt. #2479, filed Jan. 18,
 26 2007, attached as Ex. 3). The Diversified Committee disputed movants' claim that USA
 27 Commercial Mortgage would continue to service the loan, stating: "That assumption is entirely
 28 incorrect as the loan servicing rights to the Colt Gateway loan are transferred under the Plan of

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1 Reorganization to the post-Effective Date USA Capital Diversified Trust Deed Fund, LLC
 2 Movants are well aware of the fact that the Diversified Fund will become the loan servicer after
 3 the Effective Date of the Plan of Reorganization as many discussions about that fact have
 4 occurred, however, Movants chose not to inform the Court of this material fact." *Id.* at 2. The
 5 Court denied the motion for an order shortening time, stating: "When the matter is heard, moving
 6 counsel shall be prepared to explain why they failed to omit pertinent facts in their request" (Ct.
 7 Dkt. #2504, filed Jan. 19, 2007, attached as Ex. 4).

8 Despite the representations by Diversified Committee (and by debtors in their opposition
 9 to the motion for stay relief), the Colt Gateway servicing rights are not "transferred under the Plan
 10 of Reorganization to the post-Effective Date USA Capital Diversified Trust Deed Fund, LLC."
 11 Movants requested that the Diversified Committee identify the basis for their statement, and the
 12 committee pointed to Plan Section IV.D.2 concerning the post-effective-date form of Diversified
 13 Trust Deed Fund. Ex. 5, 1/20/07 Hermann-Chubb email. After careful and repeated readings of
 14 the cited section, movants' counsel believes the Diversified Committee is referring to a portion of
 15 one sentence and a parenthetical as the basis for its "rights" in the loan-servicing agreement: "The
 16 assets of the DTDF Estate retained by the Post-Effective Date include the DTDF loans (including
 17 but not limited to the rights associated with the former Epic and Sheraton Loans and the Loan
 18 Servicing Agreements for the Excluded DTDF loans)." Ex. 6, Plan at 50 (emphasis added).

19 The plan misrepresents the true facts by stating that Diversified "retains" the loan-servicing
 20 rights. Diversified did not own the loan servicing rights prior to the plan. USA Commercial
 21 undisputedly held the loan-servicing rights when it filed for bankruptcy, and this Court has never
 22 approved a transfer of those rights to Diversified. It is impossible for Diversified to "retain" the
 23 servicing rights since it never had them.

24 Furthermore, the plan did not give effective notice of any purported transfer of USA
 25 Commercial's servicing rights to Diversified. The cited language is under a section discussing the
 26 post-plan form of Diversified. However, Fertitta and Tabas never had any relationship with
 27 Diversified, other than be co-direct lenders in the Colt Gateway loan. Fertitta's and Tabas's only
 28

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relationship was with USA Commercial, and there is no discussion of this purported "transfer" of servicing rights in any plan section concerning USA Commercial.

Finally, neither debtors or the Diversified Committee engaged in any conversations with movants or their counsel about the fact that USA Commercial was "transferring" its servicing rights "to" Diversified. Chubb decl., filed concurrently with this motion. Moreover, Movants were not alone in their understanding to the contrary. The Unsecured Creditors Committee also interpreted the plan such that USA Commercial's loan-servicing rights went to the USA Commercial Liquidating Trust, not Diversified. Ex. 7, 1/20/07 Charles-Chubb email. Even the Unsecured Creditors Committee's counsel "did not appreciate" the argument that Diversified "retained" the servicing rights until after it was explained to him by the Diversified Committee's counsel. *Id.*

12 Tabas and Fertitta absolutely did not omit any pertinent facts from their motion. The
13 position taken by debtors and Diversified is a unilateral interpretation of a provision buried in a
14 section unrelated to servicing rights, misstating the rights to the servicing rights. If the plan is, in
15 fact, read to transfer the servicing rights from USA Commercial to Diversified, then USA
16 Commercial has transferred its assets without clear notice to anyone except for Diversified.

CONCLUSION

18 Tabas and Fertitta have contractual and legal rights to replace USA Commercial as the
19 loan-servicing agent on the Colt Gateway loan. USA Commercial violated numerous contractual
20 and legal provisions in servicing this loan, and it has completely abandoned its duty to the direct
21 lenders in allowing this loan to remain in default. The plan effective date also remains uncertain,
22 and Tabas and Fertitta no longer want USA Commercial to service this loan. Therefore, the Court
23 should grant the motion for stay relief in order for Tabas and Fertitta to select a new servicing
24 agent.

DATED this 12th day of February, 2007.

JONES VARGAS

//s/Louis M. Bubala III
LOUIS M. BUBALA III, ESQUIRE
Counsel for Fertitta Enterprises, Inc.,
and Estate of Tabas

CERTIFICATE OF SERVICE

1. On February 12, 2007, I served the following document(s):

**REPLY OF ESTATE OF DANIEL TABAS AND FERTITTA ENTERPRISES, INC., TO
DEBTOR'S OPPOSITION TO MOTION FOR RELIEF FROM THE AUTOMATIC
STAY TO TERMINATE THE LOAN SERVICING AGREEMENT
FOR THE DIRECT LOAN TO COLT GATEWAY LLC**

2. I served the above-named document(s) by the following means to the persons as listed below:

- a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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■ b. **United States mail, postage fully prepaid** (list persons and addresses):

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LAS VEGAS, NV 89121

9 c. **Personal Service** (list persons and addresses):

I personally delivered the document(s) to the persons at these addresses:

9 For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

9 For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

- d. **By direct email (as opposed to through the ECF System)** (list persons and email addresses):

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Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

1
2 9 e. **By fax transmission** (list persons and fax numbers):
3
4

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5
6 9 f. **By messenger:**
7
8

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a messenger for service. (A declaration by the messenger must be attached to this Certificate of Service).

9 **I declare under penalty of perjury that the foregoing is true and correct.**
10

DATED this 12th day of February, 2007.

11 _____
12 C. Grinstead //s// C. Grinstead
Name Signature

JONES VARGAS
100 W. Liberty Street, 12th Floor
P.O. Box 281
Reno, Nevada 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

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